

INCLUSIVE EDUCATION AND CONFLICT RESOLUTION: BUILDING A MODEL TO IMPLEMENT ARTICLE 24 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN THE ASIA PACIFIC



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The Convention on the Rights of Persons with Disabilities (CRPD) came into force in 2008 and now has 87 states parties. As discussed in Part I, Article 24 obligates states parties to provide an inclusive education with appropriate accommodations. This will be challenging for many governments in the Asia Pacific, where school enrolment rates for children with disabilities remain low. States parties also have an obligation to provide effective implementation mechanisms, including procedures to resolve disputes that may arise among education providers, students and their parents. In order to illustrate the elements of a possible enforcement model, Part II of the article discusses the legal framework that has evolved in the United States, which requires an “individualized education program” (IEP) for every child with a disability. Part III analyses the primary conflict resolution mechanisms, including mediation, resolution conferences, and due process hearings. While mediation has many advantages, power imbalances may undermine a child’s right to an inclusive education. Thus, due process hearings continue to provide an important safeguard in the United States. Part IV considers how these mechanisms might be adapted and improved upon in the Asia Pacific, in order to develop a rights-based enforcement model that is true to the values of the CRPD but retains the advantages of alternative dispute resolution. While it may be tempting for governments to rely upon general anti-discrimination legislation, Article 24 of the CRPD requires a more proactive and sustained approach to inclusive education.

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I. The Duty to Provide an Inclusive Education under the CRPD

The Convention on the Rights of Persons with Disabilities (CRPD)¹ is the first international treaty to expressly recognise disability as a human rights issue. Although in theory persons with disabilities already enjoyed rights under international law, in practice they often have been segregated from society and deprived of basic human rights.² The widespread ratification of the CRPD represents a commitment to abandon the medical and welfare approaches to disability, which focused on the need to care for, treat, or protect individuals with impairments.³ States parties to the CRPD should embrace the social and human rights models, which recognise that persons with impairments can be more disabled by the barriers that society places in their way than by their individual conditions.⁴ Disability is now recognised as a form of social oppression, which should be addressed through laws and policies that affirm and implement the principal goals of the CRPD – capability, inclusion, and the removal of physical and attitudinal barriers. Governments and non-governmental organisations in the Asia Pacific played an important role in drafting and promoting the treaty and are gradually ratifying it. As of June 2010, there were 30 signatories to the CRPD in the region and 18 states parties, including India, Bangladesh, South Korea, the Philippines, Thailand, Australia, New Zealand, the Lao Democratic People's Republic and the People's Republic of China (China).⁵ China has applied the treaty to the Hong Kong Special Administrative Region, with a limited reservation

¹ The CRPD and the Optional Protocol to the CRPD (containing an individual complaints procedure and an inquiry procedure) can be viewed on the web site of the United Nations Committee on the Rights of Persons with Disabilities, the body of independent experts that monitors implementation of the treaty. Available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (visited 1 April 2010).

² Anna Lawson, "United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?", (2007) 34 *Syracuse Journal of International Law and Commerce* 563–619.

³ See United Nations Treaty Collection, Chapter IV Human Rights, at 15. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (visited 1 July 2010).

⁴ See generally Rosemary Kayess and Phillip French, "Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities", (2008) 8 *Human Rights Law Review* 1–34. The terms "social model" and "human rights model" are often used interchangeably, at least in discussions of the CRPD. See Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities", (2007) 34 *Syracuse Journal of International Law and Commerce* 287, 291–292.

⁵ For discussion of China's early support for the treaty and potential conflicts with its domestic laws and policies, see Carole J. Petersen, "Population Policy and Eugenic Theory: Implications of China's Ratification of the Convention on the Rights of Persons With Disabilities", (2010) 8(1) *China: An International Journal* 85, 87–92; and Vanessa Torres Hernandez, "Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China and India", (2008) 17 *Pacific Rim Law and Policy Journal* 497.

for immigration.⁶ The United States is not yet a state party to the CRPD, although President Obama signed the treaty in 2009.⁷

The right to education is fundamental because a person without education will find it almost impossible to obtain meaningful work, live independently, or participate fully in society. The educational rights of children with disabilities are protected by many international instruments, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.⁸ In practice, however, governments have often failed to report on the educational attainment of persons with disabilities, making it difficult for international monitoring bodies to hold states accountable. A 2002 study, conducted at the conclusion of the first Asian and Pacific Decade of Disabled Persons, found that there was a “continuing and alarmingly low rate of access to education for children and youth with disabilities” in the region.⁹ Although 70 per cent of non-disabled children in the Asia Pacific were enrolled in school, less than 10 per cent of children with disabilities were enrolled.¹⁰ Young girls with disabilities face additional barriers as a result of gender stereotypes and an uneven allocation of educational resources.¹¹ A preliminary assessment of the achievements in the second Asian Pacific Decade of Disabled Persons indicates that

⁶ For discussion of this reservation and specific changes that Hong Kong should consider making in order to comply with the CRPD, see Carole J. Petersen, “China’s Ratification of the Convention on the Rights of Persons With Disabilities: the Implications for Hong Kong”, (2008) 38 HKLJ 611, 626–629. See also Kelley Loper, “Equality and Inclusion in Education for Persons with Disabilities: Article 24 of the Convention on the Rights of Persons with Disabilities and Its Implementation in Hong Kong”, (2010) 40 HKLJ 419.

⁷ The White House, Office of the Press Secretary, “Remarks by the President on Signing of UN Convention on the Rights of Persons with Disabilities Proclamation”, 24 July 2009. Available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Rights-of-Persons-with-Disabilities-Proclamation-Signing (visited 10 March 2010). The CRPD still requires ratification by the United States Senate, which has been slow to ratify human rights treaties. For further analysis see Tara J. Melish, “Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify”, (2007) 14 Human Rights Brief 37 (Winter).

⁸ For analysis of these provisions, see Vernor Muñoz, *The Right to Education of Persons With Disabilities: Report of the Special Reporter on the Right to Education* UN Doc/A/HRC/4/29 (19 February 2007), especially pp 5–10.

⁹ UNESCAP, *Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific: Note by the Secretariat*, October 2002 (hereinafter referred to as the “Biwako Millennium Framework”). Available at www.unescap.org/esid/psis/disability/bmf/bmf.html (visited 25 April 2010).

¹⁰ *Ibid.*

¹¹ See Harilyn Rousso, *Education for All: A Gender and Disability Perspective*, 2003, Background paper commissioned through the World Bank for the UNESCO EFA *Global Monitoring Report 2003/4, Gender and Education for All: the Leap to Equality* (copy on file with the author).

children with disabilities still have far less access to education than children without disabilities.¹²

A thematic treaty on the rights of persons with disabilities should help to fill this gap. Article 24 of the CRPD takes a strong and detailed position on the right to education. States parties are obligated to provide an inclusive educational system at all levels, allowing persons with disabilities to develop “their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential” and enabling them to participate effectively in society.¹³ Persons with disabilities shall not be excluded from the general education system and are entitled to an inclusive, quality and free education on an equal basis with other students in their communities.¹⁴ They are also entitled to reasonable accommodations and support within the general education system. The state should provide individualised support measures, in environments that maximise academic and social development but are consistent with the goal of full inclusion.¹⁵

It is not sufficient for governments to make empty policy statements on the right to education. Article 4 requires states parties to adopt appropriate legislative and administrative measures to implement the CRPD, and to take into account the human rights of persons with disabilities in all policies and programs.¹⁶ The state is also obligated to modify or repeal laws, regulations, customs or practices that discriminate against persons with disabilities and to ensure that public authorities and institutions (including educational institutions) comply with the treaty.¹⁷ The treaty lists specific measures that should be adopted, including a policy of employing teachers with disabilities, teachers who are qualified to communicate in sign language and in Braille, and teachers who can train others in disability awareness and appropriate educational techniques.¹⁸ Physical barriers in schools, buses and other modes of transportation also need to be removed. Research shows that 80 to 90 per cent of children

¹² See Agenda item 4: *Assessment of the achievements thus far of the Asian and Pacific Decade of Disabled Persons, 2003–2012, and the remaining challenges*, Background paper prepared by the secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) for the 23–25 June 2010 meeting in Bangkok of the Expert Group Meeting-cum-Stakeholder Consultation to Review the Implementation of the Second Asian and Pacific Decade of Disabled Persons, 2003–2012: The Biwako Millennium Framework for Action, at Figure 1 (comparing education levels of persons with and without disabilities in selected countries in Asia and the Pacific). Available at <http://www.unescap.org/ESID/hds/mtg/EGM/2010/> (visited 15 July 2010).

¹³ CRPD, Art 24(1)(b).

¹⁴ *Ibid.* Art 24(2)(b).

¹⁵ *Ibid.* Art 24(2)(c–e).

¹⁶ *Ibid.* Art 4(1)(a) and (c).

¹⁷ *Ibid.* Art 4(1)(b) and (d).

¹⁸ *Ibid.* Art 24(4)–(5).

with disabilities can be integrated into mainstream schools if the schools are accessible and students are given appropriate support.¹⁹ It is less expensive to integrate children with disabilities into the general educational system because a single integrated system lowers administrative and transportation expenses. Moreover, the resources invested benefit the community in general as inclusive education promotes independent living and a more equal and inclusive society. Children who grow up in school together are more accepting of diversity and less likely to hold stereotypical views about persons with disabilities.²⁰

The CRPD also establishes standards regarding the enforcement mechanisms for the rights stated in the treaty. In particular, Article 13 requires states parties to ensure that persons with disabilities enjoy “effective access to justice” on an equal basis with others, including any procedural and age-appropriate accommodations that may be required to facilitate their effective role as participants in legal proceedings.²¹ If a person with a disability is not in a position to exercise full legal capacity, then the state party has an obligation to ensure that any measures affecting the exercise of legal capacity “respect the rights, will, and preferences of the person, are free of conflict of interest and undue influence” and are “proportional and tailored” to individual circumstances.²² This is particularly important in the context of access to primary education, where a range of adults – parents, teachers and social workers – make decisions regarding a child’s educational goals and environment. Even loving parents may be overly protective of a child with a disability or may concentrate the family’s resources on the education of a non-disabled sibling. If a government has ratified the CRPD, it has undertaken a duty to ensure that the right to education is not undermined by these competing goals.

Article 13 of the CRPD does not express a preference for a particular method of providing access to justice. Human rights lawyers and activists may tend to associate the enforcement of rights with access to the courts. However, not all states parties to the CRPD have an independent judiciary and affordable legal services, which are important in human rights litigation. Moreover, regardless of one’s legal tradition, a

¹⁹ United Nations ENABLE, *From Exclusion to Equality: Realizing the Rights of Persons With Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), Ch 6. Available at <http://www.un.org/disabilities/default.asp?id=212> (visited 1 April 2010).

²⁰ For a review of this research, see Susan Peters, *Inclusive Education: an EFA Strategy for All Children* (World Bank, November 2004), especially Section IV. Available at http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079993288/InclusiveEdu_efa_strategy_for_children.pdf (visited 15 April 2010).

²¹ CRPD, Art 13(1).

²² CRPD, Art 12(4).

person who seeks to enforce her rights under the CRPD may prefer a more consensus-based procedure, such as private mediation or conciliation by a human rights or equal opportunities commission.²³ While there are many different styles of mediation (including facilitative, evaluative and transformative), they share a commitment to reducing the emotional stress, cost and delays that are associated with litigation.²⁴ Mediation can also be more creative than litigation, in that it is not confined to legal rights but rather addresses the parties' non-legal interests and needs. Mediators work to improve communication and understanding between the parties, helping them to explore their common interests and to shape an agreement that will benefit both parties. The educational and therapeutic benefits of mediation are particularly valuable for individuals who are likely to be in a continuing relationship after the dispute is resolved.

Although mediation has many advantages, it should not be the only mechanism for enforcing rights in the CRPD. Human rights litigation also plays an important role by educating the public, developing the law and providing complainants with a sense of vindication. Moreover, the respondent's incentive to mediate often disappears if the complainant cannot litigate.²⁵ Thus, it is important that persons with disabilities have

²³ Mediation is a process in which a neutral third party helps the parties to identify their shared interests and reach a mutually agreeable solution. The term "conciliation" is used differently across jurisdictions and contexts. It is sometimes used to refer to the general concept of facilitated negotiation or used interchangeably with the term mediation; but it can also be used to refer to situations in which the third-party neutral is exercising an enforcement power granted by statute. While conciliation is considered more interventionist than mediation in some contexts, the opposite is true elsewhere. See Jean R. Sternlight, "In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis", (2004) 78 *Tulane Law Review* 1401 (analysing mechanisms in the United States, Australia, and the United Kingdom), p 1406 and n 7. In this article, I use the term mediation except when referring to the powers of the Hong Kong EOC, which include investigation and conciliation of complaints.

²⁴ In facilitative mediation, the mediator controls the mediation process but does not evaluate the parties' positions or suggest settlement terms. In evaluative mediation, the mediator will evaluate the parties' positions, thus influencing the likely terms of settlement while leaving the ultimate power to agree with the parties. Transformative mediation is more similar to facilitative mediation in that it stresses party empowerment and mutual recognition of needs, interests and points of view. However, empowerment and recognition are so important to transformative mediation that the mediation may be considered successful even when no agreement is reached. For a general introduction to the different styles and theories of mediation, see Dorothy J. Della Noce, Robert A. Baruch Bush and Joseph P. Folger, "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy", (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39. For a comparison of American and Chinese mediation traditions, see Xiaobing Xu, "Different Mediation Traditions: a Comparison Between China and the U.S.", (2005) 16 *The American Review of International Arbitration* 515.

²⁵ For discussion of how this affects the conciliation process at the Hong Kong EOC, where respondents know that most complainants cannot afford to sue unless they receive EOC litigation assistance, see Carole J. Petersen, Janice Fong, and Gabrielle Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong* (Hong Kong: CCPL 2003), especially Ch 6.

access to other forums, such as administrative hearings, equal opportunities tribunals, or the courts. Indeed, some of the benefits of mediation can be achieved within the context of a contested case. For example, in civil commitment proceedings “mediational lawyering” may be considered more therapeutic than a purely adversarial approach, particularly if it helps the client to access appropriate health care.²⁶ Similarly, a child who files a formal complaint to enforce her rights under Article 24 of the CRPD may have a strong emotional interest in maintaining her relationship with teachers and school administrators. Opportunities for mediation may arise at various stages, and parents, advocates and educational officials should bear this in mind as they work to resolve the complaint.

Ideally, states parties to the CRPD should therefore strive to provide a mix of enforcement mechanisms – formal and informal, public and private, adversarial and consensus-based. Jurisdictions that are new to the field of inclusive education may look to foreign examples for guidance in developing a statutory framework and enforcement model. For example, when Hong Kong enacted its Disability Discrimination Ordinance (DDO) in 1995, it used Australian federal law as its statutory model.²⁷ The Americans with Disabilities Act (ADA)²⁸ has also been influential, particularly in Europe.²⁹

However, general laws prohibiting disability discrimination are arguably inadequate for inclusive education, particularly the complex field of

²⁶ See Janet B. Abisch, “Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma”, (1995) 1 *Psychology, Public Policy and Law* 120. Abisch proposed mediational lawyering as a therapeutic jurisprudence alternative to the two traditional lawyering roles in civil commitment disputes: (i) the client-centered-expressed interests (adversary/advocacy) model in which the lawyer zealously fights against commitment; and (ii) the best interests (non-adversarial) model, in which the lawyer joins in seeing that the client obtain medical help, on the assumption that the client would seek help if she realised that it was in her own best interest. See also Henry Chen, “The Mediation Approach: Representing Clients with Mental Illness in Civil Commitment Proceedings”, (2006) 19 *Georgetown Journal of Legal Ethics* 599; and Omar Shapira, “Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics”, (2008) 8 *Pepperdine Dispute Resolution Law Journal* 243 (noting the common values of mediation and therapeutic jurisprudence).

²⁷ Disability Discrimination Ordinance (Cap 487, Laws of Hong Kong). For the history of the enactment of the DDO, see Carole J. Petersen, “Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong”, (1996) 34 *Columbia Journal of Transnational Law* 335.

²⁸ Americans with Disabilities Act 42 USC §§ 12101, 12131-12165 (1990) (amended 2009). The ADA was amended by the Americans with Disability Act Amendments Act of 2008, Pub. L. No 110-325, 122 Stat. 3553 (codified as amended at 42 USC § 12101 and 29 USC § 705). The United States Department of Justice maintains a webpage (at <http://www.ada.gov/>) devoted to the ADA, with links to agencies that enforce the law in specific fields (visited 10 March 2010).

²⁹ See, for example, Katharina C. Heyer, “The ADA on the Road: Disability Rights in Germany”, (2002) 27 *Law and Social Inquiry* 723; and Michael Ashley Stein, “Disability Human Rights”, (2007) 95 *California Law Review* 75, 90 and n 86 (noting that many countries have been influenced by the ADA but cautioning against exclusive reliance on it as a legislative model).

learning disabilities. The next two sections of this article thus introduce a more specific statute, the Individuals with Disabilities Education Act (IDEA), an American law that expressly addresses the identification, evaluation and education of children with disabilities in inclusive environments.³⁰ While imperfect, the IDEA legislation has evolved over the past three decades and literally transformed American public schools.³¹ The United States has also developed a wide range of enforcement mechanisms, including annual team meetings on children's individual educational programs, free mediation services when disputes arise and due process hearings for complaints that cannot be settled amicably. This is not to suggest that governments in the Asia Pacific should simply copy the American model. A community must consider carefully whether legislation developed elsewhere can be adapted to fit its own cultural context and legal system.³² Numerous factors – including differences in educational systems, cultural differences in negotiating style,³³ the role of the judiciary and legal profession, and the presence or absence of an independent enforcement agency – need to be taken into account. Yet it is hoped that the lessons learned in the United States may help governments in the Asia Pacific to develop their own models implementing Article 24 of the CRPD.

II. The IDEA Legislation and Individual Education Programs

As recently as the 1970s, public schools in the United States routinely excluded or segregated children with disabilities, with approximately 80 percent being placed in facilities that provided little or no

³⁰ Individuals with Disabilities Education Act, 20 USC §§ 1400-87 (2010). The United States Department of Education maintains a web site (at <http://idea.ed.gov>) devoted to the IDEA legislation, its implementing regulations, and policy guidelines. For a general introduction to the statute and the implementing regulations see generally, United States Department of Education, *Building the Legacy: IDEA 2004*. Available at <http://idea.ed.gov/explore/home> (visited 10 March 2010).

³¹ See generally, Thomas F. Guernsey and Kathe Klare, *Special Education Law* (Durham: Carolina Academic Press, 2008), 3rd edn.

³² For a general introduction to the relationship between culture and conflict resolution in the region, see Bruce Barnes, *Culture, Conflict and Mediation in the Asia Pacific* (Lanham: University Press of America, 2007), revised edn.

³³ For an analysis of cultural differences in negotiating styles and a review of the literature on this issue, see John Barkai, "Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution", (2008) 8 *Pepperdine Dispute Resolution Law Journal* 403. Professor Barkai argues that an interest-based model of negotiation is not exclusively Western, so long as interests are defined to include cultural interests. *Ibid.*, p 404.

education.³⁴ At that time, more than one million American children with disabilities were entirely excluded from the public educational system and millions more were excluded from significant educational experiences.³⁵ Schools regularly classified students as uneducable or placed them in the “special education” system without notifying their parents or giving them an opportunity to participate in the evaluation and decision-making processes.³⁶

Parents and civil rights advocates challenged these policies by suing local school districts and state governments. In the absence of specific legislation, the early cases alleged that school districts were violating the equal protection and due process rights of children with disabilities. The landmark cases of *Pennsylvania Association for Retarded Children (PARC) v Pennsylvania*³⁷ and *Mills v Board of Education*³⁸ established the general principle that public schools could not exclude children with disabilities without providing notice, an opportunity for a hearing and alternative education. These cases also helped to inspire a law reform movement in favour of federal legislation protecting the right to education of children with disabilities. Under the United States federal system, the regulation and funding of public schools rests primarily with state and local governments. Congress can, however, provide additional federal funding, which currently constitutes about 10.5 per cent of the total expenditure on primary and secondary public education. Congress regularly uses this “power of the purse” to enforce federal legislation, by making funding dependent upon state compliance with federal standards.³⁹ The first significant piece of federal legislation for children with disabilities was the Rehabilitation Act of 1973. While its primary purpose is to promote rehabilitative services, it also provides, at s 504, that an “otherwise qualified individual with a disability” shall not be excluded, denied the benefits of, or discriminated against based

³⁴ See Ellen Schiller, et al., *Executive Summary: Interim Report for the Study of State and Local Implementation and Impact of the Individuals with Disabilities Education Act* (prepared for the United States Department of Education, 2005) (copy on file with the author), p 1.

³⁵ Samuel R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven and London: Yale University Press, 2009), p 17.

³⁶ See generally, Mark C. Weber, “The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Acts”, (1990) 24 *UC Davis Law Review* 349.

³⁷ *Pennsylvania Association for Retarded Children (PARC) v Pennsylvania*, 334 F Supp 1257 (E D Pa 1971) (requiring Pennsylvania to provide education to children with intellectual disabilities and to provide parents with notice and opportunity for hearing prior to any change in their children’s educational status).

³⁸ *Mills v Board of Education of D.C.*, 348 F Supp 866 (DDC 1972) (holding that the denial of public education violated the right to due process and that the school board must either give children with disabilities access to school or a hearing and alternative education).

³⁹ See generally, United States Department of Education, *The Federal Role in Education*. Available at <http://www2.ed.gov/about/overview/fed/role.html?src=ln> (visited 10 March 2010).

on disability in any program or activity receiving federal funding.⁴⁰ Section 504 continues to be enforced by the Office for Civil Rights in the United States Department of Education.⁴¹

The Office for Civil Rights also enforces Title II of the Americans with Disabilities Act 1990 (ADA), which extended the prohibition on disability discrimination to the full range of state and local government services, programs and activities, regardless of whether they receive federal funding.⁴² The ADA requires educational institutions to provide reasonable accommodations for students with disabilities, which may include, for example, accommodations in examinations, or assistance with taking notes in class.⁴³ However, students with learning disabilities have sometimes fallen outside the scope of the ADA because a plaintiff must first show that she has a recognised impairment that substantially limits a major life activity. Learning is considered a major life activity for the purposes of the ADA but not all learning disabilities have satisfied the “substantially limits” threshold.⁴⁴ Recent amendments to the ADA, which came into force in January 2009, legislatively overruled certain decisions by the US Supreme Court,⁴⁵ which had interpreted the coverage of the ADA unduly narrowly.⁴⁶ However, a student who is diagnosed with a minor learning disability may still fall outside the scope of the ADA.⁴⁷

⁴⁰ Rehabilitation Act of 1973 § 504, 29 USC § 794(a) (2010). The implementing regulations require recipients of federal funds to provide a “free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or severity of the person’s handicap”. 34 CFR § 104.33(a). Claims filed under the Rehabilitation Act are often parallel to claims filed under the IDEA, which is discussed below.

⁴¹ For information on the enforcement powers regarding education of children with disabilities, see United States Department of Education, Office for Civil Rights, *Protecting Students with Disabilities*, especially “Interrelationship of IDEA and Section 504”. Available at <http://ed.gov/about/offices/list/ocr/504faq.html#interrelationship> (visited 10 March 2010).

⁴² See n 28 above.

⁴³ For discussion of the nature of accommodations being requested and provided, especially in the area of examinations, see Nicolas L. Townsend, “Framing a Ceiling as a Floor: the Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students”, (2007) 40 *Creighton Law Review* 229.

⁴⁴ *Ibid*, pp 237–238.

⁴⁵ See, for example, *Sutton v United Air Lines, Inc* 527 US 471 (1999) and *Toyota Motor Manufacturing, Kentucky Inc v Williams*, 534 US 184 (2002). For further analysis of the impact of Supreme Court decisions, particularly in the field of employment discrimination, and tensions within the disability rights movement regarding litigation strategies, see Michael Ashley Stein, Michael E. Waterstone and David B. Wilkins, “Book Review: Cause Lawyering For People With Disabilities”, (2010) 123 *Harvard Law Review* 1658 (reviewing Samuel R. Bagenstos, n 35 above).

⁴⁶ Americans with Disabilities Act 1990, amended by ADA Amendments Act of 2008, Pub. L 110–325 (codified as amended at 42 USC §§ 12101–12213 (2010)).

⁴⁷ For analysis of the relationship between the ADA and learning disabilities, see Suzanne E. Rowe, “Learning Disabilities and the Americans With Disabilities Act: The Conundrum of Dyslexia and Time”, (2009) 15 *Legal Writing* 167.

In practice, however, the most important American law on inclusive education is the Individuals with Disabilities Education Act (IDEA), which is the primary focus of this article.⁴⁸ It was first enacted, in 1975, as the Education for All Handicapped Children Act.⁴⁹ The purpose of the law was to ensure that children with disabilities received an education, including “special education” to meet their needs. The law was subsequently re-enacted as IDEA and has been through several rounds of amendments, gradually shifting the emphasis from mere access to education to educational attainment. This shift was part of a broader “standards movement” in the United States, which is also reflected in the somewhat controversial No Child Left Behind Act of 2002.⁵⁰ The most recent amendments to IDEA were made by the Individuals with Disabilities Education Improvement Act 2004 (IDEIA).⁵¹ Reflecting the impact of the standards movement, the 2004 amendments require performance goals and indicators to assess the progress of children with disabilities. Although the legislation now reflects a strong commitment to inclusive education and equality of opportunity, the term “special education” is still regularly used to describe programs governed by IDEA and related statutes.⁵² States that receive federal funding for special education must comply with IDEA and the United States Department of Education has a separate branch, the Office of Special Education and Rehabilitative Services, to advise states on their obligations.⁵³

The IDEA and the ADA overlap in some respects but the two laws have their own distinct goals. The ADA seeks to prevent discrimination on the ground of disability in a wide range of fields and requires reasonable accommodations in certain circumstances. In contrast, the IDEA

⁴⁸ See n 30 above.

⁴⁹ Education for All Handicapped Children Act, Pub. L. No 94-142 (1975) (codified as amended at 20 USC §§ 1400-87 (2010)).

⁵⁰ 20 USC §§ 6301 *et seq.* The No Child Left Behind Act emphasises academic standards for all children, including children with disabilities. For discussion of controversies surrounding the legislation, see Liz Hollingworth, “Unintended Educational and Social Consequences of the No Child Left Behind Act”, (2009) 12 *Journal of Gender, Race and Justice* 311. For analysis of the relationship between it and the IDEA legislation, see Philip T. K. Daniel, “‘Some Benefit’ or ‘Maximum Benefit’: Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities?”, (2008) 37 *Journal of Law and Education* 347.

⁵¹ Individuals with Disabilities Education Improvement Act, Pub. L. No 108-446 (2004) (codified as amended at 20 USC §§ 1400-87 (2010)).

⁵² Special education has become a value-laden term in the United States and I do not recommend that it be used in or translated into legislation implementing Article 24 of the CRPD. For a discussion of the consequences of being designated as a recipient of “special education”, see Michael L. Perlin, “‘Simplify You, Classify You’: Stigma, Stereotypes and Civil Rights in Disability Classification Systems”, (2009) 25 *Georgia State University Law Review* 607.

⁵³ For a general introduction to the Office of Special Education, see United States Department of Education, *Building the Legacy: IDEA 2004*. Available at <http://idea.ed.gov/explore/home> (visited 10 March 2010).

and its implementing regulations mandate different treatment, in order to fit a student's individual circumstances and educational needs. The IDEA legislation is also broader than the ADA because a student seeking to rely upon IDEA need not prove that she has a disability that limits a major life activity. Thus, IDEA can benefit students with minor learning disabilities, as well as students with more severe impairments. The legislation seeks to promote meaningful education for all children with disabilities and to enable them to become self-sufficient members of society. IDEA thus requires that state and local agencies provide every child with a free, appropriate, public education (commonly known as FAPE) in the least restrictive environment possible. This means that a child with a disability should be educated in the same environment as her non-disabled peers, to the maximum extent possible. Each child should also be provided, at no charge, appropriate "special education" services, which are administered by the public schools pursuant to an "individualized education program" (known as the IEP).⁵⁴ Ideally, the IEP should not segregate a student in a caretaking program but rather should place her in a mainstream school for all or most of the school day, and provide the services and accommodations that will help her to thrive there.

IDEA and its implementing regulations⁵⁵ seek to promote parental involvement in children's education and thus provide parents with extensive procedural rights.⁵⁶ For example, while the local educational authority has the responsibility to identify and evaluate children with disabilities, it must give parents notice of its intent to evaluate their child. Parents can also request that a child be evaluated or obtain an independent evaluation if they disagree with the evaluation obtained by the school. Once a child is identified as having a disability, the educational authority has a legal obligation to form a team to draft the IEP for that child. The IEP team should include the parents, as well as a representative of the educational authority (one who is familiar with its resources), at least one "special education" teacher, at least one additional teacher and, where appropriate, the child. The IEP team meets to

⁵⁴ 20 USC §1412 (2010).

⁵⁵ 20 USC §§1412(a)(6)–1415(k) (2010). Regulations issued by the Secretary for Education pursuant to the IDEA are published in the Federal Register and at 34 CFR Parts 300 and 304 (codified at 34 CFR §§ 300.1–300.817; 34 CFR §§ 304.1–304.31). They are also available at <http://idea.ed.gov/explore/view/p/%2Croor%2Cregs%2C> (visited 10 March 2010).

⁵⁶ Pursuant to the 2004 amendments to the IDEA, the US Department of Education developed a model form for school districts to use when notifying parents of these procedural rights; it can be viewed at <http://idea.ed.gov/static/modelForms> (visited 10 March 2010).

discuss and draft an IEP, hopefully one that represents a genuine consensus and prevents disputes that could disrupt a child's education.⁵⁷

The legislation does not set rigid standards for the IEP, as the meaning of an appropriate education in the least restrictive environment will vary from child to child. However, certain topics must be covered in every IEP and the federal government provides model forms for guidance.⁵⁸ For example, the IEP should describe the present level of a child's academic performance, and identify certain measurable annual goals. It should also describe the services and technology that the educational authority agrees to provide, including the duration, frequency and location of services. The IEP should also specify the extent (if any) that the child will not participate with his or her non-disabled peers in the regular classroom. Equally important, the IEP should specify any accommodations that will be provided to the student during assessments and the services that will be provided to help transition the student to postsecondary training or employment. The IEP is the linchpin of the IDEA legislation because it translates the general statutory standard into a specific school placement and an individualised package of services.⁵⁹ The IEP team must meet at least annually to revise the IEP and the child should be re-evaluated at least every three years.⁶⁰ This regular schedule of meetings and evaluations helps to ensure that a child's educational program changes when her needs change.

The IEP team meetings are also intended to provide a vehicle through which parents can contribute to and monitor the educational experience of their child. Indeed, the IDEA and its implementing regulations contemplate a system of shared decision-making. The school district typically makes an initial offer of a "placement" in a school and a package of services to be provided to the child. While many parents accept the initial offer, others will suggest modifications. For example, parents may request a different school with better facilities, a teaching assistant in the classroom, or a larger package of educational services and accommodations. Parents with sufficient financial resources may retain

⁵⁷ See United States Department of Education, *IDEA Regulations: Individualized Education Program (IEP) Team Meetings And Changes to the IEP*, available at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C9%2C> (visited 10 March 2010).

⁵⁸ Pursuant to the 2004 amendments to the IDEA, the United States Department of Education issued a model form for an appropriate IEP, which can be viewed at <http://idea.ed.gov/static/modelForms> (visited 10 March 2010).

⁵⁹ 20 USC § 1414(d) (2010).

⁶⁰ 20 USC § 1414(d)(4) (2010).

a professional advocate to assist them at the IEP meetings.⁶¹ There are also many support groups that provide free advocacy assistance or help parents to become effective advocates in their own right.⁶² For example, the federal government funds “parent centers” which provide information on community services and ways to resolve conflicts with schools and other agencies.⁶³ Some parents invest substantial time in learning advocacy skills and then volunteer to train other parents. Nonetheless, families with limited resources or heavy work schedules may find it difficult to acquire these skills and participate effectively in the IEP process. This can create an unequal distribution of resources for children with disabilities, even within the same school district.⁶⁴

In some cases, the relationship between parents and education officials becomes tense, especially if parents request services that the local educational authority is not willing to provide. Families who move from one state to another are also sometimes disappointed to find that their new school district provides fewer services than their original school district. Although the federal government supplements funding, the bulk of a public school’s budget comes from state or local taxes, which can create enormous disparities in facilities and resources. This is one of the common criticisms of IDEA and other legislation regulating the public schools, that the federal government establishes standards without adequate funding. School officials generally do not discuss their annual budget in the IEP meeting, as this is not a legal excuse for failing to offer a free appropriate public education (FAPE). Yet parents often suspect that budgetary constraints are the real reason for denying requests for certain

⁶¹ The Council of Parent Attorneys and Advocates, Inc (COPAA) maintains a directory of lawyers and professional advocates on its web site, available at <http://www.copaa.net/> (visited 15 July 2010). The role of professional advocates is somewhat controversial. For example, interviews conducted for this article indicate that professional advocates are sometimes retained not to help reach an agreement but rather to reach an impasse, so that the parents can request the state to pay for private school placement. Advocates who are not licensed attorneys must also be careful not to practice law, the definition of which depends on applicable state law.

⁶² See, for example, Children’s Law Clinic, Duke University Law School, *Helpful Resources for Parents and Advocates*, available under “Resources and Links” at <http://www.law.duke.edu/childlaw/resources#resources> (visited 10 June 2010); and Linda Wilmshurst, *A Parent’s Guide to Special Education: Insider Advice on How to Navigate the System and Help Your Child Succeed* (New York: AMACOM, 2005).

⁶³ A 2003 study reported that there were 105 parent centers and that every state had at least one. See General Accounting Office, *Special Education: Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts* (Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, US Senate, GAO Publication No 03–897, 2003), p 9. The Technical Assistance Alliance for Parent Centers currently lists 104 centers on its directory, available at <http://www.taalliance.org/ptidirectory/pclist.asp> (visited 15 July 2010).

⁶⁴ See Daniela Caruso, “Bargaining and Distribution in Special Education”, (2005) 14 *Cornell Journal of Law and Public Policy* 171.

services.⁶⁵ Differing views of the child's abilities and needs are another common cause of conflict at IEP meetings. For example, a child might display a particular skill at home but not at school, leading to divergent assessments of what the child is capable of achieving and the appropriate educational targets.⁶⁶

There is extensive literature on how schools can encourage parental participation and build a good working relationship.⁶⁷ It is arguably in the school's best interest to follow that advice, as conflicts are less likely to develop when parents feel that they are informed, consulted, and valued by their child's school.⁶⁸ Nonetheless, school officials sometimes act in ways that make parents feel devalued or intimidated. For example, if a single parent arrives at the IEP meeting and finds that all of the teachers and school officials are already seated on one side of a long table, the parent will find herself sitting alone, facing a much larger "team" on the other side. This creates the perception that the parent has been invited to a competitive negotiation rather than to a co-operative team meeting. Similarly, if a school fails to allocate sufficient time for the IEP meeting, parents will feel rushed and unable to articulate their views. Schools have also been accused of making most decisions regarding the IEP before the team meeting begins, in an attempt to pre-empt parental participation.⁶⁹ Some parents have even described "assembly line" processes, in which all the parents with IDEA-eligible children were gathered together in a large room and the teachers and school officials simply moved from table to table, signing the paperwork that had been drawn up in advance and spending little or no time discussing individual students.⁷⁰ This format is clearly not what Congress envisioned when it legislated the IEP process and it is a recipe for conflict. However, one can see how it could come about, especially in a school district that cannot afford to compensate

⁶⁵ See Jeannie F. Lake and Bonnie S. Billingsley, "An Analysis of Factors That Contribute to Parent-School Conflict in Special Education", (2000) 21(4) *Remedial and Special Education* 240-251 (July/August) (reporting the results of interviews with parents, school officials and mediators in Massachusetts, and identifying eight factors that tend to escalate or de-escalate conflict: discrepant views of a child or her needs, knowledge, service delivery, constraints, valuation, reciprocal power, communication and trust).

⁶⁶ *Ibid.*

⁶⁷ See, for example, Diane Marie Dabkowski, "Encouraging Active Parent Participation in IEP Team Meetings", (2004) 36(3) *Teaching Exceptional Children* 34-39; and Jeannie F. Lake and Bonnie S. Billingsley, n 65 above.

⁶⁸ See n 65 above, pp 245-251.

⁶⁹ See Robert L. Burgdorf Jr, "Restoring the ADA and Beyond: Disability in the 21st Century", (2008) 13 *Texas Journal on Civil Liberties and Civil Rights* 241, 243.

⁷⁰ See Nancy A. Walsh, "Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value", (2004) 19 *Ohio State Journal of Dispute Resolution* 573, 616.

teachers for participating in individualised meetings outside their normal working hours.

An encouraging development is that educational authorities are increasingly embracing the concept of facilitated IEP meetings.⁷¹ In this model, an outside facilitator is retained to assist with the overall organisation and conduct of the IEP meeting. The meeting is still run by the parents and school officials but the facilitator maintains order and encourages a collaborative atmosphere.⁷² The goals are to create a well-written IEP, to ensure that parents have a meaningful opportunity to participate and to prevent breakdowns in communication. The team must abide by IDEA and its implementing regulations regarding the basic content of the IEP. Beyond those requirements, however, the concept of “facilitation” is somewhat flexible and may be applied differently from state to state.⁷³ While some states allow a member of the IEP to facilitate, this is not advisable. The educational authority should appoint a skilled and completely neutral facilitator. Individuals who have served as mediators in IDEA disputes (a process described in the next section of this article) are often strong candidates, as they will already understand the relevant legal standards. The individual also needs to have strong facilitation skills, which include keeping the group focused on the topic, summarising and reframing what others have said to ensure understanding, suggesting ways to examine issues and to collectively brainstorm solutions, and fostering an environment in which all IEP team members feel comfortable expressing their ideas. This may be particularly challenging if the IEP team has already had antagonistic meetings, leaving the participants feeling jaded and vulnerable.

Some IDEA facilitators describe their role in fairly limited terms – as making sure that the meetings start and end on time and ensuring that everyone gets a chance to speak.⁷⁴ Even this is valuable, as the feeling that one is “not being heard” is one of the principle factors that escalate

⁷¹ Consortium for Appropriate Dispute Resolution in Special Education (CADRE) *Facilitated IEP Meetings: An Emerging Practice*, available at <http://www.directionservice.org/cadre/pdf/Facilitated%20IEP%20for%20CADRE%20English.pdf> (visited 10 May 2010).

⁷² See Tracey G. Mueller, “IEP Facilitation: A Promising Approach to Resolving Conflicts Between Families and Schools”, (2009) 41(3) *Teaching Exceptional Children* 60; and also President’s Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* (1 July 2002), p 40 (recommending IEP facilitation as a conflict prevention strategy).

⁷³ For an example of guidelines, see State of North Carolina, Department of Public Instruction, *Special Education Facilitation in North Carolina: Facilitated IEP Team Meeting Guidelines* (3 July 2008), available at http://www.ecac-parentcenter.org/education/documents/iepguidelines_000.pdf (visited 2 May 2010).

⁷⁴ One facilitator/mediator who was interviewed for this article noted that she has less influence when facilitating an IEP meeting than when she is retained to mediate a dispute, a process described in the next session of the article.

conflicts between parents and schools.⁷⁵ Ideally, however, the facilitator's role should be larger and can begin even before the meeting. For example, the facilitator can assist members of the team to agree in advance on their goals for the IEP meeting and for the IEP itself. This can be done through pre-meeting conversations or through "goal sheets" distributed to the team members. The facilitator then uses the goals and the legally required components of the IEP to establish an agenda for the meeting. If the agenda includes the estimated amount of discussion time for each item, the parties will have realistic expectations. It is then the facilitator's responsibility to keep to the time limits for each agenda item, as team members lose interest if an item that they cared about is never reached.⁷⁶ The facilitator also has the responsibility of articulating and adhering to a set of ground rules for the meeting. If there is sufficient time, the team itself can discuss and agree upon the ground rules, which are then posted for all team members to view. However, if time is short, the facilitator can present the team with a suggested list of rules, which the team can then modify at the start of the meeting. Typical ground rules are: (i) only one person speaks at a time; (ii) everyone participates and no one dominates the meeting; (iii) the time for individual comments is limited (generally to two or three minutes per comment); (iv) team members agree to be open-minded and non-judgmental; and (v) the facilitator will enforce agreed limits for each agenda item. If the discussion threatens to be diverted by an extraneous issue, the facilitator needs a strategy for setting aside that issue, at least temporarily. For example, the facilitator can label a visible flip chart as the "Parking Lot" and use it as a place to record (or "park") new issues as they are raised. This permits the team to stay on track while validating members' voices. The technique works best if some time can be saved at the end of the meeting (or in a subsequent meeting) to address the issues that have been recorded on the Parking Lot.

If an education authority uses facilitated IEP meetings, along the lines suggested above, it will have longer meetings than schools that just go through the motions and quickly complete the IEP paperwork. A facilitated IEP meeting can easily take four hours. However, if the meeting reaches a true consensus then it is well worth the time investment, as it will help to reduce future conflicts. Although not required by the IDEA legislation, the facilitated IEP meeting is increasingly considered to be one of the most effective methods of promoting both the right

⁷⁵ See n 65 above, p 248.

⁷⁶ This and the other suggestions noted in this section are based upon interviews with individuals who have facilitated IEP meetings and on suggestions by Tracey G. Mueller (n 72 above).

to inclusive education and the community's interest in reducing expensive litigation. By 2008, 24 states in the United States had started to offer IEP facilitation, while an additional eight states were developing facilitation programs.⁷⁷ A government that is creating an enforcement framework for Article 24 of the CRPD may wish to consider improving upon the American model by requiring facilitated IEP meetings between schools and parents of children with disabilities. The mechanism may be particularly valuable in communities where parents have traditionally deferred to school officials and thus may hesitate to offer opinions on their children's educational needs.

III. Dispute Resolution under IDEA: Formal and Informal Mechanisms

If the parties reach an impasse on the content of the IEP or if parents suspect that the educational authority is violating IDEA, then parents in the United States have a right to file a formal complaint and request a due process hearing before an impartial hearing officer.⁷⁸ Parents can do this at any time during the identification, evaluation, or educational placement process. They may also file a complaint after the IEP is signed if they believe that the educational authority has failed to implement the IEP. The due process hearing is a quasi-judicial forum where both sides can present witnesses, evidence and legal arguments.⁷⁹ Unless a state statute provides otherwise, the burden of proof falls on the party seeking relief, usually a parent.⁸⁰ If a complaint is successful, a range of remedies can be obtained, including an order to provide a particular service or placement or an order to reimburse parents for the cost of private education while they were disputing the placement that was offered by

⁷⁷ See Kelly Henderson, "Optional IDEA Alternative Dispute Resolution", *inForum*, May 2008, p 7 (report of study conducted for Project Forum of the National Association of State Directors of Special Education), available at <http://www.projectforum.org> (visited 15 July 2010).

⁷⁸ See 34 CFR § 300.507(a) (2010) (providing that a parent or public agency may file a due process complaint on the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child). Federal law also contains certain minimum requirements (at 34 CFR 300.152–153) for state complaint procedures (consisting of a review by the state educational authority to determine whether a school district has violated IDEA), which are not discussed in this article.

⁷⁹ 34 CFR §§ 300.500–300.520 (2010).

⁸⁰ Although the IDEA legislation is silent on this issue, the US Supreme Court followed the normal default rule and allocated the burden of proof to the party seeking relief. *Schaffer v Weast*, 546 US 49, 56–58 (2005). However, the Supreme Court did not rule out the possibility that a state legislature could override the default rule and allocate the burden of proof to school districts. For discussion, see Lara Gelbwasser Freed, "Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education", (2009) *Brigham Young University Education and Law Journal* 103.

the school.⁸¹ Successful complainants may also obtain attorneys fees.⁸² Throughout the litigation, a “stay-put” rule prevents the educational authority from excluding the child from the public school system or from changing the placement in a way that would disadvantage the child; this is intended to protect the child during litigation and prevent retaliation against parents who file complaints.⁸³ The annual number of due process hearings rose steadily from 1991–1997, stabilised in the period 1998–2005,⁸⁴ and then started to decrease after 2006.⁸⁵ Parties who are not satisfied with the decision and have exhausted their administrative remedies may start a civil action in court⁸⁶ and one commentator has referred to IDEA as a “prominent source” of federal court cases.⁸⁷ However, the number of cases that proceed to court is small when compared to the large number of students (more than 6 million) who are receiving services under IDEA.⁸⁸ It is also noteworthy that a very small number of

⁸¹ If parents place their child in a private school because the educational authority failed to provide a free appropriate public education (FAPE) in a timely manner, the state may be required to reimburse the parents for the cost of private education. However, if parents place their child in private school without consent of the educational authority they run the risk of a determination that the placement offered by the public school complied with the law, in which case they will not be reimbursed. See Lewis M. Wasserman, “The Rights of Parentally-Placed Private School Students under the Individuals with Disabilities Education Improvement Act of 2004 and the Need for Legislative Reform”, (2009) *Brigham Young University Education and Law Journal* 131. The US Supreme Court has confirmed that parents may seek tuition reimbursements regardless of whether their child previously received special education services in the public school system. *Forest Grove School District v T.A.*, 129 S Ct 2484 (2009). While some commentators welcomed the decision, others argue that it encourages parents who can afford to pay private tuition to avoid the collaborative process envisioned in the legislation and abandon the public school system. See Stacey Lynn Sheon, “Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court’s Treatment of Private-Tuition Reimbursement Under the IDEA”, (2010) 49 *Washburn Law Journal* 599.

⁸² 20 USC § 1415(i)(3)(B) (2010). Some plaintiffs have also filed “Section 1983” claims (based on a provision in the Civil Rights Act of 1871 that provides a cause of action for damages for violation of a federal statute or constitutional right). But these claims have been barred by many federal circuits on the ground that the IDEA legislation itself provides a comprehensive remedial scheme. See Candace Chun, “The Use of Section 1983 as a Remedy for Violations of the Individuals with Disabilities Education Act: Why it is Necessary and Should be Allowed”, (2009) 72 *Albany Law Review* 461.

⁸³ 20 USC § 1415(j) (2010). This does not, however, bar changes to the general education system even though they might affect children with disabilities. *N.D. v State of Hawaii*, 600 F 3d 1104 (9th Cir 2010) (holding that Hawaii’s decision to reduce the number of school days during a budget crisis did not violate the stay-put rule).

⁸⁴ Perry A. Zirkel and Karen L. Gischlar, “Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis”, (2008) 21(1) *Journal of Special Education Leadership* 22 (recording the annual number of due process hearings by state and year from 1991 to 2005).

⁸⁵ See Perry A. Zirkel and Gina Scala, “Due Process Hearing Systems Under the IDEA: A State-by-State Survey”, (2010) 21(1) *Journal of Disability Policy Studies* 3, 4–8.

⁸⁶ States may provide a one-tier system or a two-tier system (in which case the state provides a second level of review prior to either party having the right to resort to court). *Ibid.* pp 3–4.

⁸⁷ Mark C. Weber, “The IDEA Eligibility Mess”, (2009) 57 *Buffalo Law Review* 83 (critiquing courts’ inconsistent jurisprudence regarding eligibility for IDEA services).

⁸⁸ See General Accounting Office (n 63 above), pp 1–4, and n 1.

states (plus the District of Columbia) account for the vast majority of hearings in IDEA disputes.⁸⁹

While the due process hearing is an important safeguard, there are many reasons why it should not be the only enforcement mechanism. First, as parents cannot be certain that they will win attorneys' fees (and will not be reimbursed for expert fees), affluent families are more likely to request and benefit from a due process hearing. Second, the fear of a due process hearing may lead some school personnel to view parents as potential adversaries rather than as partners in their children's education.⁹⁰ When due process hearings do occur they are stressful and time-consuming. The educational authority and the parent can become "locked in conflict for as long as a year, fighting over the details of a child's education program and damaging their working relationship".⁹¹ This painful reality may dissuade some parents from filing a complaint, as they will not want to jeopardise their relationship with school personnel. Due process hearings are also very expensive, not only for parents but also for taxpayers, who ultimately pay for the hearing officer and the legal expenses incurred by the educational authority (either the local school district or the state). No government wants to divert money from education to adversarial proceedings.

For all these reasons, legislators have looked for ways to encourage parents and school districts to use alternative dispute resolution. The first development was to provide free mediation services to parents who have filed complaints. There are different styles of mediation and no set approach is followed in the field of inclusive education.⁹² If the mediator practices facilitative mediation then the mediator will not evaluate the strength or weaknesses of the parties' respective positions. If, on the other hand, the mediator practices "evaluative mediation" then the mediator normally has extensive knowledge of the law and previous cases, and can advise on the likely outcome if the complaint were to proceed to a hearing. By 1996, a majority of states had some form of mediation program for disputes relating to IDEA and surveys suggested that mediation was achieving a high rate of settlement.⁹³ Thus, in 1997, Congress amended the IDEA legislation to require states to offer mediation services to parents who filed complaints on behalf of their children. The states bear the costs of the mediation and must appoint qualified

⁸⁹ See n 85 above, p 6.

⁹⁰ Steven Marchese, "Putting Square Pegs into Round Holes: Mediation and the Rights of Children With Disabilities Under the IDEA", (2001) 53 *Rutgers Law Review* 333, 344.

⁹¹ *Ibid.* p 335.

⁹² See n 24 above for a brief explanation of the different styles of mediation.

⁹³ See n 90 above, p 345.

and impartial mediators. The parents are not, however, required to participate in mediation; it is an entirely voluntary process for them. Parents who participate in mediation can still request a due process hearing if the parties do not reach an agreement and statements made during mediation may not be used in a later due process hearing.⁹⁴

This legislative nudge toward mediation has not been limited to IDEA disputes but rather is part of a broader national trend in favour of alternative dispute resolution, a movement that had already gained its own acronym (ADR) by the 1980s. Mediation has been used extensively in cases alleging unlawful discrimination and guidelines have been developed to address issues that arise in the context of disability discrimination.⁹⁵ However, the ADR movement has been controversial, especially in the context of civil rights cases. Owen M. Fiss was an early critic and his article "Against Settlement" has been reprinted in numerous books on dispute resolution.⁹⁶ Professor Fiss pointed out that lawsuits are often commenced by individuals or groups who have historically suffered discrimination and who seek to enforce their legal right to equality. These plaintiffs typically have far less bargaining power than the defendants and may be disadvantaged in any negotiation or mediation process. There is also a potential loss to society if interest-based settlements entirely replace precedent-setting litigation. As Professor Fiss put it, the "settlement of a school suit might secure the peace, but not racial equality".⁹⁷ Proponents of ADR might respond to Professor Fiss by pointing out that contentious litigation can exacerbate feelings of hostility and discrimination, particularly when the parties are competing for limited public resources. Moreover, regardless of the social value of litigation, the fact is that not all potential plaintiffs wish to litigate. Many would prefer to secure a remedy through a confidential and less adversarial process. In short, there is no one ideal mechanism for resolving discrimination complaints; governments should not erect barriers to litigation but they should provide alternatives to litigation.

In some ways, disputes arising from the IDEA legislation seem perfectly suited for mediation, partly because the parties are not normally disputing a general legal principle but rather the educational needs of

⁹⁴ 20 USC § 1415(e)(2)(F) (2010).

⁹⁵ The ADA Mediation Guidelines were developed at the Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law and published by the *Cardozo Journal of Conflict Resolution*, available at <http://www.cojcr.org/ada.html> (visited 29 August 2010). Although created for disputes under the ADA (rather than the IDEA), the ADA Mediation Guidelines address certain general issues, such as accessibility and party capacity, which are equally relevant in the context of education.

⁹⁶ Owen M. Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073.

⁹⁷ *Ibid.* p 1085.

one particular child.⁹⁸ Parents also have an interest in resolving the dispute quickly and finalising the terms of their child's educational placement. Moreover, unlike the typical employment discrimination case in the United States (where the plaintiff seeks money damages but does not plan to work again for the defendant), the parties to an IDEA dispute may have to interact for many years, until the child completes school. Thus the parties will often see a value in avoiding adversarial litigation and preserving working relationships.

An additional advantage of mediation is that it may help to promote the parental-participation goals of the IDEA legislation. If the mediator is skilful, parents who felt ignored during an IEP meeting may find that the mediation session finally gives them an opportunity to speak and be heard. In one study, parents who were interviewed immediately after the mediation session expressed significant satisfaction at being permitted to discuss their child for several hours – in contrast to a much shorter IEP meeting.⁹⁹ Indeed, both parents and representatives of educational authorities valued the opportunity to speak, the ability of the mediator to “translate” what they had said, and the feeling of being understood by the other party. Thus, on the face of it, one might conclude that mediation is superior to due process hearings and there is a body of research supporting that conclusion in the context of inclusive education.¹⁰⁰

Yet problems have been identified with mediation of IDEA disputes. One tension is that school officials find ways to bring their budget constraints to the table, giving parents the impression that there is no room for negotiation. This may pressure parents to agree to compromises that undermine the statutory goals of IDEA.¹⁰¹ In contrast, a hearing officer would simply focus on the law and the appropriateness of the child's placement, leaving it to the educational authority to comply with the decision. Mediation may also exacerbate power imbalances. As “repeat players”, school officials become experts in the field and familiar with the mediation process. In contrast, parents are generally less experienced and may find it difficult to challenge the experts at the mediation table.¹⁰²

⁹⁸ However, in some cases plaintiffs do challenge a policy that affects many children with disabilities. For example, *N.D. v State of Hawaii*, 600 F 3d 1104 (9th Cir 2010) challenged (unsuccessfully) Hawaii's decision to reduce the number of school days for all students in the public school system during a budget crisis.

⁹⁹ See n 70 above, pp 619–620.

¹⁰⁰ A good deal of the positive research can be located on the web site of CADRE (the Consortium for Appropriate Dispute Resolution in Special Education), which encourages the use of mediation and other collaborative strategies and is funded by the Office of Special Education at the United States Department of Education. Available at <http://www.directionservice.org/cadre/index.cfm> (visited 30 March 2010).

¹⁰¹ See n 90 above, p 345.

¹⁰² See n 70 above, p 622.

Parents are also emotionally involved in the dispute, which can create a high level of anxiety and a strong incentive to reach an agreement and go home.

The negative aspects of mediation are exacerbated when parents are new to the process and lack legal representation.¹⁰³ Complainants entering mediation without an attorney often feel overwhelmed by the other party or incorrectly expect that the mediator will advocate for them.¹⁰⁴ One highly experienced mediator who was interviewed for this article described the “early days” of IDEA mediation in her community. Parents frequently came to mediation without a lawyer, either because they could not afford one or did not realise that they would need one. The representatives of the educational authority were tough negotiators and willing to use any means, even threats, to keep services to the minimum.¹⁰⁵ There was a high rate of settlement but poor outcomes, as parents were often pressured into accepting less than what their child needed. The mediator recalled “shutting down” some mediation sessions because the power relationship had “shifted so far out of balance”.¹⁰⁶ Some parents later thanked this mediator for stopping the mediation, as they fared better at the due process hearing. However, she also reported that mediation outcomes improved as parents started to prepare more thoroughly and became more aware of the need to bring an attorney or an experienced advocate.

The movement towards alternative dispute resolution for IDEA disputes has continued and intensified in the United States, partly because of the child’s interest in prompt resolution of any dispute but also because society has a strong financial interest in reducing the number of hearings. The legislation and implementing regulations now encourage mediation of almost any dispute, even if no formal complaint has been filed. States are not required to reimburse parents for attorney fees incurred during mediation, although some organisations offer free advocacy services.

¹⁰³ For a summary of arguments supporting and opposing attorney participation in mediations, see also Edward Feinberg & Jonathan Beyer, *The Role of Attorneys in Special Education Mediation* (Consortium for Appropriate Dispute Resolution in Special Education 2000), available at <http://www.directionservice.org/cadre/roase.cfm> (visited 29 August 2010).

¹⁰⁴ In the study by Nancy Walsh (n 70 above), p 631, parents expressed a desire that the mediator be a “neutral advocate”, meaning that she would advocate for them without overtly taking sides. Our study of conciliation at the Hong Kong EOC also found that complainants without legal representation tended to rely upon EOC officers to advocate for them in conciliation conferences and were disappointed when officers explained that they would remain neutral. See Petersen, Fong, and Rush (n 25 above), Ch 6.

¹⁰⁵ For example, the mediator recalled that a representative of the educational authority threatened, during the mediation session, to report the parents for allegedly neglecting their child. Interview notes, May 2010, on file with the author.

¹⁰⁶ Interview notes, May 2010, on file with the author.

States are, however, required to appoint mediators who are knowledgeable about special education law, which arguably reflects a legislative intent to ensure that the mediator is aware of the legislative purpose and can advise on the likely outcome if the complaint were to proceed to a hearing. However, the legislation does not require mediators to use any particular style of mediation for IDEA disputes, allowing them to choose whether to use facilitative or evaluative approaches. This is sensible because an experienced mediator may want to adjust the style of mediation in particular cases.¹⁰⁷ However, it also means that there is no requirement that the mediator use her knowledge of the law to advise the parties on the relative merits of their positions. Thus, parents need to understand their own position and be prepared to articulate it in the mediation session. Fortunately, there is now a large body of literature available to assist parents in preparing for mediation.¹⁰⁸

In 2004, a new mechanism, the resolution session, was added to the IDEA legislation. Unlike mediation (which must be offered but is entirely voluntary for parents), the resolution session can only be skipped if both parties agree to waive it. If the educational authority does not agree to waive it and the parents decline to attend, then the hearing officer may be asked to dismiss the complaint.¹⁰⁹ The educational authority is required to convene a resolution session within 15 days of receiving a formal complaint.¹¹⁰ There is also a 30-day waiting period between the resolution session and the due process hearing, which may increase the incentive for the parties to settle the complaint at the meeting. The educational authority must send someone to the resolution session who has decision-making power and the parents (or their attorney) are expected to present the basis for the due process complaint and the supporting facts. The goal is to give the educational officials a better understanding of the complaint and a final chance to resolve it without a hearing. If an agreement is reached then it is binding and enforceable, unless it is voided by one of the parties within three days.

Preliminary research indicates that educational officials support the use of resolution conferences, as they provide an opportunity to negotiate with parents after a formal complaint has been filed and the issues

¹⁰⁷ Nancy A. Walsh (n 70 above) argues that mediators should be flexible and prepared to move between different mediation styles to suit the relative power of the parties and other circumstances.

¹⁰⁸ For an example of a user-friendly manual, see The Advocacy Institute and the Duke Law School Children's Law Clinic, *Preparing for Special Education Mediation and Resolution Sessions: A Guide for Parents and Advocates*, November 2009, available at <http://www.law.duke.edu/childedlaw/edrights> (visited 10 June 2010).

¹⁰⁹ 34 CFR § 300.510(b)(4) (2010).

¹¹⁰ 20 USC § 1415(f)(1)(B) (2010); 34 CFR § 300.510 (2010).

have crystallised.¹¹¹ Researchers have also noted a decline in the number of due process hearings in recent years though it is too soon to conclude whether this is due to the resolution sessions, as the implementing regulations only went into force in 2006.¹¹² Some advocates for children with disabilities are concerned that resolution sessions undermine the goals of the IDEA legislation. This is partly because the educational authority is not required to pay attorney fees arising from resolution session, which discourages parents from bringing an attorney.¹¹³ Although the educational authority cannot bring an attorney if the parents do not have one, this rule does not equalise the two sides because school officials have greater knowledge of the law and more experience with settlement negotiations. Resolution sessions are probably more intimidating for unrepresented parents than mediation because there is no requirement that a third-party neutral participate in the resolution session. There is also no requirement that information disclosed during the resolution session be kept confidential, although the parties can enter into a confidentiality agreement if they wish to do so.

Fortunately, many states are voluntarily developing facilitation programs for resolution meetings.¹¹⁴ Facilitators cannot advise either party on the law but they can keep discussions civil and also re-frame and clarify parties' statements during the meeting. This makes it more likely that parents understand the terms of settlement that are being offered by the educational authority. Evaluations from a pilot facilitation program in Oklahoma showed that 100 per cent of respondents would use a facilitator again and would recommend a facilitator to others.¹¹⁵ In contrast, states that do not use facilitators have reported that the parties are often distrustful of the resolution process and try to waive their rights to participate.¹¹⁶ These findings may encourage more states to develop facilitation programs for resolution meetings. It is important, however, that the facilitators be independent third parties and not employees of the educational authority; otherwise parents are unlikely to have confidence in the neutrality of the facilitator.

¹¹¹ See Kelly Henderson and Philip Moses, "Resolution Meetings: State Supports and Practices", *inForum* (Oct 2008) (reporting on a multi-state study that included interviews), available at <http://www.directionservice.org/cadre/ResolutionMeetingsStateSupportsandPractices.cfm> (visited 30 May 2010).

¹¹² See n 85 above, p 6.

¹¹³ In the states studied by Kelly Henderson and Philip Moses (n 111 above), p 7, it was rare for attorneys to be present at resolution sessions.

¹¹⁴ In 2008, 14 states (about one-third of respondents) reported using facilitators in resolution meetings; an additional three states were planning to adopt the practice and two were piloting facilitation programs. See Kelly Henderson (n 77 above).

¹¹⁵ See n 111 above, p 5.

¹¹⁶ *Ibid.* pp 6–7.

IV. Developing an Enforcement Framework for Article 24 of the CRPD

Under Article 24 of the CRPD, children with disabilities have the right to receive an inclusive and quality education on an equal basis with other students in their communities. Although the CRPD provides significant details on the substantive steps that should be taken to achieve an inclusive educational system, it largely leaves it to governments to determine the enforcement mechanisms. Some governments may prefer to rely upon a general law prohibiting disability discrimination in education, while adopting policy measures to comply with the specifics of Article 24. However, if too much is left to the realm of policy then inclusive education ceases to be an enforceable right. Moreover, schools and teachers need specific guidance on how to implement Article 24. For example, schools need to know when they should evaluate a child and how to respond if the parents request their own evaluation. Schools also need guidance on how to develop or modify educational programs for children with disabilities, the extent to which parents should be involved in creating a program and how often a program should be revised. If schools develop these policies on their own, there will inevitably be inconsistencies and disputes.

There is also a real danger that some schools will simply try to exclude children with disabilities, particularly in communities in which schools compete for the “best” students in hopes of building an elite reputation. The Hong Kong Equal Opportunities Commission (EOC) regularly receives complaints from parents of children who are excluded from schools (or about to be expelled) as a result of their disabilities. But it is difficult for the EOC to apply the very general standards in the DDO to these complaints, particularly in the highly specialised field of learning disabilities. Moreover, even if the EOC successfully conciliates a complaint, it has no statutory power to monitor the parties’ relationship after they sign a conciliation agreement.¹¹⁷ This is problematic because new issues may arise; a child’s educational needs change over time and the educational program may need adjustments. Thus, a strong argument can be made that a government seeking to implement Article 24 should not simply rely on a vague law or a broad policy statement on inclusive education. Ideally, a government should initiate a public consultation and a law reform exercise, with the goal of adopting a comprehensive

¹¹⁷ This limitation in Hong Kong’s existing model was emphasised in comments received at the November 2009 conference (see the Introduction to the Focus section of this volume) and in interviews conducted for earlier publications by this author.

and detailed statute on inclusive education, supported by an appropriate enforcement model.

After more than 30 years of tinkering, the American model for inclusive education is far from perfect.¹¹⁸ Nonetheless, governments implementing Article 24 of the CRPD could usefully borrow at least four core principles from the IDEA legislation. The first is that a child need not prove that she has been “discriminated against” in order to assert her right to a free, appropriate and inclusive education. The IDEA legislation is not linked to the concept of “unlawful discrimination” but rather establishes positive rights for all students with disabilities. In contrast, a student who is filing a complaint under a traditional anti-discrimination law (such as the Hong Kong Disability Discrimination Ordinance) would normally have to allege unlawful discrimination. This means that the complainant needs to identify a non-disabled comparator who has been (or would be) treated more favourably or identify some educational requirement that indirectly discriminates against the complainant.¹¹⁹ This poses analytical difficulties in the field of disability rights, particularly in the complex field of learning disabilities.¹²⁰ In the Hong Kong context, the “mediation mechanism” that the Hong Kong Education and Manpower Bureau established to address parents’ complaints against schools is also based on the concept of eliminating disability discrimination.¹²¹ In contrast, the IDEA legislation seeks to provide an appropriate and inclusive education, regardless of whether a child has proven discrimination.

The second valuable principle that can be borrowed from the IDEA legislation is the concept of an individual education program (the IEP). By requiring that every IEP have certain components – including present levels of academic achievement and functional performance, measurable annual goals, a statement of how the child’s disability affects involvement in the general education curriculum, and any individual,

¹¹⁸ For example, Robert L. Burgdorf Jr (n 69 above) provides a brief but stinging criticism at p 244 and pp 356–57, n 562.

¹¹⁹ In the context of the Hong Kong DDO (n 27 above), see the definition of unlawful discrimination in s 6 and also the prohibition against discrimination in education in s 24. The affirmative defenses in ss 24(4) and (5) are also problematic for a child asserting her right to an inclusive education. See also the DDO Code of Practice on Education, which is similarly built upon the discrimination framework and is available at http://www.eoc.org.hk/eoc/otherproject/eng/color/youthcorner/education/cop_edu/cop_edu_b.htm (visited 29 May 2010); and Kelley Loper, n 6 above (critiquing the need to identify a comparator).

¹²⁰ For critique of the comparator test in the Hong Kong DDO and its application by the courts in the context of provision of services, see Carole J. Petersen, “The Failure of the Hong Kong Court of Appeal to Recognize and Remedy Disability Discrimination”, (2000) 30 HKLJ 6. For critique of the DDO in the context of inclusive education, see Kelley Loper n 6 above.

¹²¹ See Hong Kong Education and Manpower Bureau, *Elimination of Disability Discrimination: Parent-School Coordination and Mediation Mechanism* (2003) (copy on file with the author).

appropriate accommodations – the IDEA legislation and its implementing regulations compel schools to address certain basic issues for every child with a disability. By requiring that the IEP be revised annually and that a child be re-evaluated at least every three years, the legislation helps to ensure that a child with a disability is not permanently placed in an educational program that is not working or that she has outgrown. This is consistent with one of the core principles of the CRPD, which is to respect the evolving capacities of children with disabilities.¹²² Similarly, Article 24 requires states to adopt educational programs that will enable persons with disabilities to develop to their fullest capacity.¹²³

This leads to the third important element in the IDEA legislation, participation by parents and, where appropriate, by students with disabilities. The IDEA legislation provides detailed procedural rights for children and their parents, starting with the evaluation of a child and following through to the development and implementation of the IEP. This is consistent with general CRPD principles, including respect for individual autonomy and the right of persons with disabilities to make their own choices.¹²⁴ Article 7 of the CRPD also requires that children with disabilities be afforded the right to express their views on matters affecting them.¹²⁵ However, procedural rights do not ensure equality of participation, as some parents will be more involved and stronger negotiators than others. To some extent, this problem can be addressed through training literature, parent assistance centers, and non-governmental organisations. Facilitated IEP meetings also encourage family participation and help to prevent conflicts from developing. However, governments in the Asia-Pacific region could improve upon the American model by providing professional advocates for children within the system.

Finally, enforcement of the IDEA legislation has allowed the United States to experiment with a variety of dispute resolution processes, including mediation, resolution sessions and due process hearings. Although mediation has many advantages, it should not be the only mechanism for enforcing the rights in the CRPD. It is sometimes assumed that complainants from countries in the Asia Pacific will always

¹²² CRPD, Art 3(h).

¹²³ *Ibid.* Art 24(1)(b).

¹²⁴ *Ibid.* Art 3(a).

¹²⁵ The treaty recognises that the views of children are to be given due weight in accordance with their age and maturity and that the best interests of the child shall be the primary consideration. See CRPD, Art 7(2)–(3).

prefer mediation to litigation.¹²⁶ Yet interviews in Hong Kong indicate that many disability rights activists would choose a hearing over conciliation, partly because they seek to educate the public and bring about systemic change.¹²⁷ Moreover, it is often the threat of litigation that gives the respondent the incentive to negotiate a meaningful remedy with a complainant. That is almost certainly why some IDEA disputes in the United States are finally settled in resolution sessions, when the dispute is only 30 days from a due process hearing. This demonstrates the importance of providing complainants with access to a coercive enforcement mechanism. The exact nature of that mechanism will depend on the nature of the underlying legal system. However, a strong argument can be made for offering something similar to a due process hearing, either before an independent hearing officer or in a specialist equal opportunities tribunal. These forums tend to be less formal than the courts and more appropriate for fact-specific disputes that require a prompt resolution.¹²⁸

While this article has focused on domestic enforcement, international and regional mechanisms are also important. All states parties to the CRPD are obligated to report to the Committee on the Rights of Persons with Disabilities, which should question governments closely about their implementation of Article 24. The Committee welcomes information from non-governmental sources and has distributed training materials to advise NGOs on how they can contribute to the reporting process.¹²⁹ Other treaty-monitoring bodies (particularly the Committee on the Rights of the Child and the Committee on Economic, Social,

¹²⁶ See, for example, Bobby K. Y. Wong, "Traditional Chinese Philosophy and Dispute Resolution", (2000) 30 HKLJ 304 (stating that Chinese communities prefer a conciliatory approach to dispute settlement).

¹²⁷ See Carole J. Petersen, "A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law", (2005) 25(4) *Disability Studies Quarterly* (reporting interviews with disability rights activists and complainants under the DDO and proposing the creation of an informal equal opportunities tribunal).

¹²⁸ An exploratory study of IDEA due process hearings in Iowa concluded that they are slowly becoming more judicial in nature and that this is contrary to the interests of both children and the schools. However, this is something that can be avoided if the legislative framework is carefully drafted. See Perry A. Zirkel, Zorka Karanxha, and Anastasia D'Angelo, "Creeping Judicialization In Special Education Hearings? An Exploratory Study", (2007) 27 *Journal of the National Association of Administrative Law Judiciary* 27.

¹²⁹ See United Nations Office of the High Commissioner for Human Rights, *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors* (Professional Training Series No 17, 2010), available on the web site of the Committee on the Rights of Persons with Disabilities, at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (visited 10 July 2010).

and Cultural Rights) should also be informed regarding any barriers to inclusive education.¹³⁰

At the regional level, governments of the Asia Pacific participated actively in the development of the CRPD and have widely acknowledged that persons with disabilities have a right to education.¹³¹ However, the Asia Pacific has yet to develop a regional human rights system to assist in enforcing this and other human rights. This is unfortunate because persons with disabilities have made good use of the European and Inter-American systems.¹³² Although workshops have been held in the Asia Pacific to discuss the development of a regional mechanism, progress has been slow, partly due to the region's enormous size and variations in culture, religion and political systems. The Association of South East Asian States (ASEAN) has taken steps to create a sub-regional mechanism and the ASEAN Intergovernmental Commission on Human Rights (ICHR) was formally established in 2009. Unfortunately, the ICHR is primarily promotional and advisory; it lacks enforcement powers and is not independent of the governments that created it.¹³³ The ICHR is, however, expected to develop an ASEAN Human Rights Declaration and it is important that disability groups participate in this project, to ensure that their rights are expressly included. ASEAN has also established a Commission on the Promotion and Protection of the Rights of Women and Children.¹³⁴ This body should be asked to promote inclusive education

¹³⁰ See Kelley Loper, n 6 above, for a helpful discussion of the extent to which treaty-monitoring bodies have adopted a substantive approach to the rights to equality and education, and the relevance to inclusive education.

¹³¹ See n 12 above, especially Figure 1 (identifying the gap in education levels of person with and without disabilities in the Asia-Pacific region as one of the significant unmet challenges of the Second Asian and Pacific Decade of Disabled Persons).

¹³² For examples of recent jurisprudence of the European Court of Human Rights, see *Glor v Switzerland*, App No 13444/04 (30 April 2009) (applying Art 14 of the European Convention on Human Rights to a case of disability discrimination and citing the CRPD, although Switzerland is not a state party); and *Alajos Kiss v Hungary*, App No 38832/06 (20 May 2010) (holding that Hungary unlawfully restricted voting rights on the basis of disability). For additional examples of the application of European and Inter-American regional instruments in the field of disability rights, see Alison A. Hillman, "Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System", (2005) 12 *Human Rights Brief* 25; and Michael L. Perlin, "International Human Rights Law and Comparative Mental Disability Law: the Universal Factors", (2007) 34 *Syracuse Journal of International Law and Commerce* 333, 340–352.

¹³³ For the terms of reference and other information on the ASEAN ICHR, see its web site at <http://www.aseansec.org/22769.htm> (visited 10 July 2010). For the history of efforts to establish an ASEAN human rights mechanism see Andrea Durbach, Catherine Renshaw, and Andrew C. Byrnes, "A Tongue But No Teeth? The Emergence of a Regional Human Rights Mechanism in the Asia Pacific Region", (2009) 31 *Sydney Law Review* 211 (2009), and also the web site of the Working Group for an ASEAN Human Rights Mechanism, available at <http://www.aseanhrmech.org/> (visited 10 July 2010).

¹³⁴ See "Inaugurated: ASEAN Commission on the Promotion and Protection of the Rights of Women and Children", 7 April 2010, available on the web site of the Working Group for an ASEAN Human Rights Mechanism at <http://www.aseanhrmech.org/news/ASEAN-commission-inaugurated.htm> (visited 10 July 2010).

and to monitor the school enrolment and graduation rates of children with disabilities.

Another potential ally in the campaign for implementing the CRPD is the Asia Pacific Forum of National Human Rights Institutions (APF). The APF has expressly recognised disability as a mainstream human rights issue; it participated in the drafting process for the CRPD and is now actively promoting its ratification and enforcement.¹³⁵ To be a member of the APF, a national human rights institution must be established in compliance with the United Nations Principles relating to the Status of National Institutions (commonly referred to as the “Paris Principles”), which require independence from government.¹³⁶ Thus, the APF can offer a more independent voice than the ASEAN ICHR. However, individuals cannot file complaints with the APF, as it is only an association of national human rights bodies and has no enforcement powers of its own.¹³⁷ In order to fill the gap in regional enforcement, it has been proposed that the Asia-Pacific region establish a Disability Rights Tribunal, which would have the capacity to hear complaints, issue decisions and provide remedies for violations of the rights of persons with disabilities.¹³⁸ This idea is certainly worth pursuing. However, given the historic reluctance of governments in the Asia Pacific to create a regional mechanism with enforcement powers, it might be wise to include a voluntary mediation program under the auspices of the proposed tribunal.

In 2012, the second Asian and Pacific Decade of Disabled Persons will conclude and a high-level intergovernmental meeting will be held in South Korea to conduct a final review. The meeting will provide an excellent opportunity not only to celebrate the achievements but also to acknowledge the remaining barriers to equality for persons with disabilities. Disability rights organisations have suggested that a third decade should be adopted to support advocacy and reforms beyond 2012. A third decade would, no doubt, focus on promoting the ratification and

¹³⁵ See publications and submissions by the APF on disability, available at <http://www.asiapacificforum.net/issues/disability> (visited 10 July 2010).

¹³⁶ The Paris Principles were adopted by the United Nations Commission on Human Rights in 1992 and by the United Nations General Assembly in 1993. See GA Resolution 134, 48th Session, 85th Meeting, UN Doc A/RES/48/134 (1993).

¹³⁷ See *About the Asia-Pacific Forum*, available at <http://www.asiapacificforum.net/about> (visited 10 July 2010).

¹³⁸ See Michael L. Perlin and Yoshikazu Ikehara, “Creation of a Disability Rights Tribunal for Asia and the Pacific: Its Impact on China?”, paper presented at the *European China Studies Association Fifth Annual Conference*, Copenhagen, June 2010 (copy on file with the author).

implementation of the CRPD.¹³⁹ Given that exclusion from education is directly associated with higher rates of unemployment and poverty, it is hoped that compliance with Article 24 can be identified as a priority. If so, statutes like the IDEA legislation in the United States can provide a useful starting point for governments to build upon during the third Asian and Pacific Decade of Disabled Persons.

¹³⁹ See *Agenda item 6: Proposals on the Way Forward After 2012*, Background paper prepared by the secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) for the 23–25 June 2010 meeting in Bangkok of the Expert Group Meeting-cum-Stakeholder Consultation to Review the Implementation of the Second Asian and Pacific Decade of Disabled Persons, 2003–2012: The Biwako Millennium Framework for Action), paras 25–31. Available at <http://www.unescap.org/ESID/hds/mtg/EGM/2010/> (visited 20 July 2010).